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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 112

THE UNITED STATES OF AMERICA

v.

EDWARD BENZ.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR EDWARD BENZ.

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(35,022)

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Jurisdiction.

As stated in the Government's Brief, jurisdiction of the court is conferred by Section 239 of the Judicial Code; and the case is not moot, since the appellee will be recommitted if this Court should hold that the District Court was without power to amend the sentence.

I. Summary.

The true limitation of a court's power to amend a sentence is that the amendment must be made *within the term* when the sentence is imposed. This power was always exercised in England, and the judges increased and decreased sentences before the judgment was entered and the record completed at the end of the sessions. The American courts have limited the exercise of the power to a mitigation of the sentence. One decision of the United States Supreme Court is based on a recognition of the right of the trial judge to cut a sentence within the term. The limitation urged by the Government has no support in legal tradition, and is not called for by considerations of logic or of policy.

II. English Law.

There must of course be some arbitrary limit on the court's power over its own judgments, some final point of time after which it is too late for the judge to change his mind. Sessions, or the term of court, was considered as a single day, during which the court could reconsider and amend. The judgment of the court did not become final till it was entered on the rolls at the end of the session, and was thus given solemn external completion. But during term—in civil as in criminal cases—judgments remained unrecorded and were always subject to change.

Coke speaks of the rule and of its reason (Coke on Litt., 260 (*a*)):

"Of courts of record you may read in my Reports: but yet during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when the terme is past, then the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie."[1]

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[1] This quotation is preceded by the following: "(1) Recordum, is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of court of justice which hath power to hold plea according to the course of the common law, of reall or mixt actions, or of actions *quare vi et armis*, or of personall actions, whereof the debt or damage amounts to fortie shillings or above, which we call Courts of Record, and are created by parliament, letters patent, or prescription.

It is aptly derived of *recordari*, which is to keepe in memorie or record, as it is said, *quod dicere nihil aliud est quam recordari;* and in the same sense the poet useth it, *si rite audita recordor*. But legally records are restrained to the rolles of such only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *secundum legem et consuetudinem Angliae*. And the rolles being the records of memorialls of the judges of the court of record, import in them such uncontrollable credit and veritie, as they admit no averment, plea, or proofe to the contrarie. And if such a record be alleaged, and it be pleaded that there is no such record, it shall be tried only by it selfe; and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient."

Thus Chitty (1 Chitty 722):

> "In case of misdemeanors, it is clear the court may vacate the judgment passed, before it becomes matter of record, and may mitigate, or pass another, even when the latter is more severe. And the justices at sessions have the same power during the session, because it is regarded as only one day; but they cannot do it at any subsequent period, unless an adjournment be entered on the roll. And no court can make any ~~allegation~~ alteration, when once the judgment is solmnly entered on the record."

Chitty does not deal differently with sentences of which the execution has already begun. And it would appear from the following examination of the English cases that the judges constantly exercised this power, increasing or decreasing sentences during the term, irrespective of whether the defendant had previously been committed.

In *Regina v. Fitzgerald*, 1 Salk. 401 (1701), it is reported:

> "The defendant being convicted of a scandalous libel, judgment was given against him to pay 100 marks fine, and go to all the Courts in Westminster Hall with a paper in his hat. In Chancery he behaved himself impudently, and justified his offense, for which reason the Court (during term) increased his punishment by imprisonment."

Lord Holt, in an early case, affirmed the Court's power:

> "The Sessions is all one day, and the justices may alter their judgment at any time, while it

> continues (*Inter the Parishes of St. Andrew's Holborn, and St. Clement's Danes,* 2 Salk. 424, 1795)";

and added (2 Salk. 607) in the same case, again before the Court:

> "During the Sessions the order was in the breast of the Court; and though it was drawn up, yet it was so far in the breast and power of the Court, that by the second order it ceased to be a record. *The Court at the Old Bailey have altered and set aside their judgments ten times at the same sessions.* (Italics ours.) * * * So it is of judgments here; which during the same term are in the breast of the Judges * * *"

In *Rex v. Jane Fletcher,* 1 R. & R. 58 (1803), the Court said (p. 60):

> "The sentence may be corrected or altered at any time during the assizes."

In *King v. Price,* 6 East. 323 (1805), the court held that a sentence of one month to Newgate, and then that the prisoner should be "transported beyond the seas for seven years", was not warranted by the statute; and Lord Ellenborough imposed a second sentence "for the purpose of passing upon them a different judgment (which he observed might be done at any time within the same term)."

Not a word, in any of these cases, limiting the court's power to change a sentence only before execution had begun.

Wharton, an accurate student of criminal law, repeats the doctrine in words which assume the broader power, adding the new limitation, developed, as we shall see, in American Courts, that if the sentence has been begun it cannot be increased.

> "As a general practice, the sentence, when imposed by a court of record, is within the power of the Court during the Session in which it is entered, and may be amended at any time during such session, *provided a punishment already partly suffered be not increased* (italics ours—3 Whart. Cr. Pr. 1853)."

III. **Supreme Court Cases.**

Basset v. United States, 9 Wall. 38 (1869), is direct authority for the proposition that a court has power to alter its sentences partly executed within the term. Were it not for *dicta* in the later Supreme Court decisions, particularly the *Murray* case, the *Basset* decision would be conclusive. This was a suit on a recognizance. The prisoner "had been sentenced to imprisonment in the jail of Erie County for six months, *and was sent to that prison.*" (Italics ours. The quotation is from the report.) On motion of the district attorney he was brought back; again on the district attorney's motion the former judgment was set aside, the prisoner was given leave to withdraw his former plea of guilty, and his recognizance was entered conditioned on his appearance during the term. His recognizance was declared forfeited on his failure to appear when summoned. Basset argued (report, p. 39);

> "That there was no indictment as recited in said recognizance pending against their principal when the recognizance was entered into, because they say that he had pleaded guilty to the indictment, and judgment has passed against him, and he had been delivered to the jail of Erie County, *and had entered upon the expiration of his sentence.* (Italics ours.)"

The reporter adds: "*All of this took place during the same term of the Court* (italics are the Reporter's)." The Supreme Court, speaking through Mr. Chief Justice Chase, affirmed judgment on the bond, saying (p. 41), that there could be "no reason to doubt that the Court had power during that term, for proper cause, to set aside the judgment * * * This control of the Court over its own judgment during the term is of every-day practice."

The United States in its brief (p. 6) dismisses the case by citing it to show that a judge may grant a new trial after service of the sentence has begun; and in a foot-note points out that the court cannot grant a new trial after the expiration of the term. The term, then, is the limit of power, not the fact that the prisoner has gone to jail. If, as the United States later argues, the Judge's power ceases when the prisoner is turned over to the executive, how can the *Basset* case be sound? Surely if the Court, after the prisoner has served part of the sentence, can permit him to withdraw his plea and grant a new trial, the Court can likewise shorten his sentence.

Ex parte Lange, 18 Wall. 163, was decided four years after the *Basset* case, Taney writing the opinion,

Clifford dissenting at great length, and Strong joining in the dissent. Lange had been sentenced to a fine *and* imprisonment under a statute imposing fine *or* imprisonment. He paid the fine and served five days in jail. The trial court set aside the sentence and imposed one of imprisonment. This the Supreme Court held error, since a man cannot be twice punished for the same offense. Payment of the fine constituted complete execution of the sentence. But the Court recognizes the power to mitigate a sentence, partly executed (p. 174):

> "If the Court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first."

To put it a little differently the Court, by using the alternative, said in substance that if the lower court had rendered a judgment for two years' imprisonment, after a part of the sentence had been executed, it could have vacated that judgment during the term and rendered a judgment for one year's imprisonment.

In delivering the court's opinion, Mr. Justice Taney said (p. 167):

> "The general power of the Court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable.

> And this is the extent of the proposition intended to be decided in the case of Bassett *v.* United States."

Justice Clifford, dissenting on the ground that payment of the fine was a revocable act, believed that the decision attacked this very power of the court, which the Chief Justice had taken pains to reaffirm, and said (p. 192):

> "Power of a court over its judgments during the entire term in which they are rendered is unlimited. Every term continues until the call of the next succeeding term * * * and until that time the judgment may be modified or stricken out. During the same session or assize or any adjournment thereof, says Mr. Archbold,[1] the Court may vacate the judgment passed upon the defendant, before it has become matter of record, and pass another less or even more severe."

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[1] Archbold's Criminal Practice & Pleading, Pomeroy's 8th Edition, page 593 (*i*), *Judgment amended:*

> "A judgment, pronounced by a court of oyer and terminer or jail delivery, may be altered or amended by the judge, at any time during the same assizes; a judgment by a court of quarter sessions may be altered at any time during the same sessions; and a judgment of the Court of Queen's Bench, at any time during the same term: provided the sentence be not actually entered of record.[1]"

[1] "It has been correctly observed, that the judge during the term, is a living record, and, therefore,

In the language of none of these cases is there a suggestion that execution of sentence should limit this absolute and inherent power.

In *Reynolds v. United States*, 98 U. S. 145 (1878), the lower court had sentenced the defendant to hard labor, the statute under which the sentence was imposed not including hard labor in the sentence, execution of which had begun. The Supreme Court set aside the judgment, and directed that a sentence should be entered omitting the requirement of hard labor (note, p. 168).

In *Bronson v. Schulten*, 104 U. S. 410 (1881), the plaintiff sued to recover overpayments on custom-house duties and obtained a judgment. This was set aside, a reference made, and a new judgment entered on the referee's report and paid. Seventeen years later

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during that period of time, he may alter and supply from his own memory, any order, judgment and decree, which has been pronounced, and this because, having made them himself, he is presumed to retain them in his recollection. But, at common law, after the term has elapsed, the judge has no such power, because it is supposed that there will be a period at which a judge will cease to retain in his memory the things which have been ordered and adjudged, and that period, it is well conceived, may be the end of the term, as he will then be apt to dismiss from his thoughts the things which have been previously passing in them. It is, indeed, a very delicate power, and might be subject to much abuse, especially in criminal cases, if the extent to which it might be carried was not well defined, and properly checked by law. See *The State v. Harrison*, 10 Yerger Tenn. Rep. 542."

the circuit court on motion based on affidavits set aside the judgment. The Supreme Court held error on the ground of *laches*, and because the term had expired. But no consideration was given to the fact that the judgment had been executed. The court reaffirmed the general principal (p. 415):

> "It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court."

Many of the recent Federal decisions, cited by the United States, are based on a *dictum* of Mr. Justice Taft in *U. S. v. Murray*, 275 U. S. 347 (1927). The Chief Justice says (p. 358):

> "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte* Lange, 18 Wall. 163."

But, as we have seen, the *Lange* case is authority for no such proposition, but, as if the court were fearful that it might be misinterpreted, reaffirmed the broader principle which the decision is not intended to weaken.

The *Murray* case is not, as the United States suggests, very nearly controlling in the instant case. The court held that the power to grant probation under

the Probation Act (March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Title 18, Secs. 724-727) must be exercised before execution of the sentence began. The court construed the act narrowly, did not have before it the consideration here involved, and the *dictum* referred to, based on a misconception of the *Lange* case, was unnecessary to the decision. The Chief Justice, construing a statute, believed that Congress would not wish to overburden the hard-worked district judges by subjecting them to applications of convicts for clemency until the final ending of the sentences. But we are not here construing any grant of power, or considering, therefore, the presumed reasonableness of the legislative mind. It is urged simply that the courts have always had the power, essentially a judicial one when exercised in the same term.[1]

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[1] The Supreme Court gives the same reason as the English courts for exercising power over judgments within the term. *Goddard v. Ordway*, 101 U. S. 745, 752 (1879). "The allowance of the appeal * * * was a judicial act of the court in term time. The order was entered on the minutes as part of what was done in the cause by the court while in session (citing *Ex parte Lange* and *Basset v. U. S.*) * * * As part of the 'roll of that term,' they are deemed to be 'in the breast of the court during the whole term.' Bac. Abr., Tit. Amendment and Jeofail, A. Under this rule, we think it clear that the court had the power during the term * * * to set aside the order * * *"

IV. State and Federal Cases.

As has been pointed out by the United States the State decisions are in conflict[1] and about evenly di-

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[1] In favor of the power even after part execution of the sentence: *Plain v. State of Georgia*, 60 Ga. 284 (1878); *State v. Butler*, 18 Atl. (Md.) 1105 (1890); *In the Matter of John Brittain*, 93 N. C. 587 (1885), where the court said (p. 589): "It would be very extraordinary if this form of mitigating a punishment during the sitting in which it was imposed, was to be denied the court, and thus the sentence become irrevocable. Cannot the judge remit part or even all of a fine? If so, is his authority to reduce the term of confinement to be denied?"; *State v. Crook*, 115 N. C. 760 (1894); *State v. White*, 117 N. C. 804 (1895); *Weber v. State*, 58 O. 616 (1898); *Ammon v. Johnson*, 3 O. Cir. 263 (1888); and see also *People v. Dane*, 81 Mich. 36 (1890), which held that where the Court had sentenced a prisoner under an Act which was later found not to apply, it could resentence him after he had begun to serve the former sentence; and *Price v. Commonwealth*, 74 Va. 819 (1880), where the court first discharged the prisoner and later during the term sentenced him. Most of these cases cite *Ex parte Lange* as their authority. As to the cases cited *contra* by the Government (Brief, 15)—*Emmerson v. Boyles*, 170 Ark. 621 (1926), two judges dissented and in the dissenting opinion, after citing the *Basset* case for his authority, the judge says, page 635: "It may be conceded that there is a conflict in the authorities, but, in view of this conflict, it would be best, in my opinion, to follow the Supreme Court of the United States and especially so as we have not heretofore decided the

vided. The digests recognize the exercise of the broader power.[2]

It should be noted that the decisions of the Federal Courts favorable to the Government's contention are all recent, decided since 1922 (U. S. Brief, p. 12). The earliest Federal case rules squarely in favor of the broader power. *In re Graves*, 117 Fed. 798 (1902). The petitioner on a *habeas corpus* had been sentenced

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exact point in issue." In *State v. Ensign*, 38 Ida. 539 (1924), the order of the court annulled and vacated the previous sentence, and it does not appear from the report whether this was done before or after the term; In *Brabandt v. Commonwealth*, 157 Ky. 130 (1914), the court, after sentencing the prisoner to 12 months, later, in denying a new trial, suspended the sentence during good behaviour. An indefinite suspension of sentence is usually held to be illegal; in *State v. Peter Davis*, 31 La. Ann. 249 (1879), the first sentence was for seven months in the parish prison and the second for six months in the penitentiary; and *Commonwealth v. Maloy*, 57 Pa. 291 (1858), is not in point. It held merely that the court may not amend the sentence after the term.

[2] 16 C. J. 1315: "It has been held, however, that where a sentence has been partly executed it may be revised and another in diminution or mitigation substituted for it during the term"; and 25 Enc. L., 2 Ed., 315: "The court cannot, even during the term at which the sentence was rendered, set it aside and render a new sentence. But it may, at any time during the term at which the sentence was rendered, modify it by remitting part of the punishment, even though its execution has already commenced."

to the House of Correction for two years. The warden refused to carry out the sentence because he was not allowed to receive Federal prisoners for such a term under the State law. The petitioner was recalled, after he had served part of his sentence, and sentenced to one and a half years. The District Court said (p. 799):

> "It involves only the inquiry whether the court possessed the power to recall the prisoner, set aside the sentence, and impose another modified sentence during the same term, *notwithstanding the fact alleged that execution of the former sentence had commenced* (italics ours); and, whatever diversity of opinion appears in other jurisdictions, the doctrine is established in the federal courts that such power exists, and that it is applicable as well where the original sentence was in excess of jurisdiction (citing cases)."

The court points out that there was no excess or want of jurisdiction in the original sentence. The court refers to *Ex parte Lange* as recognizing this doctrine, and deciding merely that payment of the fine operated as a satisfaction of the judgment.

The court in the *Graves* case cited, among others, two earlier Federal cases, *Ex parte Waterman*, 33 Fed. 29 (1887), and *U. S. v. Harman*, 68 Fed. 472 (1895). The *Waterman* case held that the court may change the place of imprisonment after sentence and partial execution; and the *Harman* case that where the prisoner had been illegally sentenced, and on appeal the case remanded, he could be sentenced again after he had served four months.

In *Tiberg v. Warren*, 192 Fed. 458 (1911—C. C. A., 9th Circuit), the Circuit Court discharged a prisoner on *habeas corpus;* the respondent then filed a supplemental return, praying that the order of discharge be vacated. The trial judge vacated the order and remanded the prisoner in the same term. The Court of Appeals held this action within the court's power, citing the *Bronson, Basset,* and *Lange* cases (p. 463). The order had actually been executed since the prisoner had been discharged.

It is argued by the Government, based on the reasoning of the recent Federal decisions denying the broader power, that once the prisoner is in the hands of the executive—the marshal or the keeper of the prison—the judicial power ends, and thereafter only executive action can affect the sentence. Yet actually this is not the case. The Government admits that "the trial court may grant a new trial during the term in which the judgment was rendered after the defendant has commenced to serve his sentence" (Brief,p.6). But this is a judicial act exercised after the executive has taken over the prisoner. There can be no doubt of the broad general principle that a court exercises discretion over its judgments within the term in which they are rendered. Why should this power be limited by the exercise of an executive act, which can more logically be considered as done in furtherance of judicial power, carrying it out, not exhausting it. The executive does not act, and cannot act, in these circumstances, independent of the judiciary. It is the "arm of the law", fulfilling the law's command.

And if this discretion existed in early courts is it a wise public policy, assuming that policy and not traditional power is involved, to deny it to the District Courts? Should not rather their hands be strengthened by a broad construction, recognizing their inherent powers wherever they are questioned?

V. Usurpation of the Executive Power.

The Government argues that modification of a sentence by a court in the term in which it was rendered amounts substantially to a pardon, a function of the executive and not of the judiciary under our theory of the separation of powers. Power to reduce sentence, it is said, is essentially an exercise of the power to pardon. But is it? It is admitted that courts can reduce a sentence, validly entered, where no execution has begun. From the point of view of mitigation the effect is the same as if the prisoner had gone to jail. Moreover the act of pardon wipes away the effect of guilt, restoring civil rights. Modification of the sentence has no other effect than to lessen the punishment.[1]

In *Ex parte Grossman*, 267 U. S. 87 (1924), where the court decided that a criminal contempt was pardonable by the President, the converse was contended—that the pardon was an encroachment by the executive on the judiciary, violating the latter's independence and the principle of the separation of powers. The

[1] The power to suspend sentence does not conflict with the power of the Governor to grant reprieves. *In re Buchanan*, 146 N. Y. 264 (1895).

court considered and rejected this argument: "The Federal Constitution," says Chief Justice Taft, page 119, "nowhere expressly declares that the three branches of the Government shall be kept separate and independent * * * (p. 120). The fact is that the Judiciary, quite as much as Congress and the Executive, is dependent on the coöperation of the other two, that government may go on."

Failing back on logic, the Government argues that if courts can diminish a sentence after execution, they should also be able to increase it, and this power the decisions deny them. But it would not seem that the English courts ever had in mind such a distinction (*King v. Price, supra*, p. 5, where the sentence was increased). The cases in this country are perhaps traceable to the greater leniency to criminals found in American criminal practice. And an increase in sentence, although constituting in legal theory but a single judgment, before the end of the term, is in effect double punishment, abhorrent to our system based on constitutional guaranties (*People v. Sullivan*, 54 Misc. (N. Y., 1907) 489).

The question certified should be answered in the affirmative.

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SUPREME COURT OF THE UNITED STATES.

No. 112.—October Term, 1930.

The United States of America, *vs.* Edward Benz	On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

[January 5, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case is here on a certificate from the court below under § 239 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938; U. S. C., Title 28, § 346. Benz was indicted for a violation of the National Prohibition Act. He entered a plea of guilty and was sentenced to imprisonment for a term of ten months beginning December 27, 1929. While undergoing imprisonment under this sentence, and before expiration of the term of the federal district court which had imposed the sentence, he filed a petition asking that the sentence be modified. The court, over the objection of the United States, entered an order reducing the term of imprisonment from ten to six months. The government appealed, and the court below, desiring the instruction of this Court, certified the following question:

"After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?"

The contention of the government is that after the defendant has been committed and has entered upon service of a valid sentence, the power of the court to alter the sentence, even at the same term, has come to an end. In addition, some stress is put upon the fact that the powers of the three departments of government are separated by the Constitution, so that one of the departments may not exercise the powers conferred upon either of the others; and it is suggested that from this separation the implication fairly